



*"...the defendant says that what was published ... [is] true based on the ground that he is a Representative of the People who has a moral and social duty to the people he represents and these are matters in which he has an interest and the people to whom such a communication is made also have an interest in hearing, and which cannot be held as defamatory of character under section 10..."*

The defendant has elected to be tried by jury and I have now to decide the question of whether the article was made under the circumstances in section 10 and could, therefore, be protected by the qualified privilege under that section.

The burden of proving that the article comes within the privilege is on the defendant and he must prove every matter that is needed to bring the statement within it. There is no dispute that the defendant is a Peoples' Representative and that he published this article in the newspaper of which he was the publisher at that time. The publication was a fresh stage in a long running campaign in his paper to suggest that the report of an audit of the finances in the Legislative Assembly for the years 1993 - 1994 should be made public. This article added, for the first time, the allegation that it had been improperly altered by the plaintiff.

There is no dispute about the position of the defendant and the paper nor of the fact of the publication and so the question of whether the circumstances are such as to render the occasion privileged under the section is one of law for the court.

The defendant gave evidence that he considered it part of his duty as a Member of Parliament to bring all matters of maladministration to the attention of the general public especially in relation to the manner in which public funds are used by public bodies. The question for the court is whether the defendant had a duty to make the communication and the people to whom it was made had a proper interest in receiving it. The interest must not be an idle curiosity but a real and legitimate interest and there must be a real duty to publish the statement. It is not sufficient that the defendant believed he had such a duty however genuinely that belief may have been held.

The defendant is the first Peoples' Representative for Tongatapu. I accept that his election as a Peoples' Representative does impose a duty on him to keep his electors informed of matters that may cause them genuine concern. Maladministration of Parliamentary funds must be a matter of sufficient import and I have no hesitation in finding that the electors in Tongatapu have a sufficient interest in receiving such information.

It is necessary in the present case to consider two further matters. First is whether the manner of publication was sufficiently directed only to persons who had an interest in receiving it and, if it was, secondly whether, in the circumstances of this case, the added allegation that the alteration was done

by the plaintiff is sufficiently germane to the original subject to be protected by the same privilege.

On the first, there is authority on the equivalent provision in England that publication in a newspaper rarely attracts such a privilege because the publication will inevitably be to many people who do not have a sufficient interest in receiving the statement. There is evidence that Kele'a is sold throughout Tonga. I am satisfied that an improper alteration of a report to cover up misuse of public funds must be a matter of sufficient interest to all members of the public in Tonga to allow the privilege to extend to the article even though published to other regions of the country. The fact the allegation is now acknowledged to have been untrue does not affect the qualified privilege except insofar as it relates to the question of malice, ill-will or other improper motive.

It was originally pleaded by the plaintiff that Kele'a is distributed abroad but that was disputed by the defence. The plaintiff adduced no evidence to establish the wider circulation. Had it been proved that Kele'a was distributed beyond the country, my ruling would have been otherwise.

The second point is whether the further allegation that the alteration was done by the plaintiff is also protected by the same privilege. I adopt the statement of Lord Loreburn in *Adam v Ward* (1917) AC 309 at 320;

*"The fact an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant or pertinent to the discharge of the duty or exercise of the right of the safeguarding of the interest which creates the privilege will not be protected. ... the judge has to consider the nature of the duty of right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion."*

The original defence was that the allegation that the plaintiff made the alteration was true but that can no longer be sustained. However, if the allegation was that this report had been improperly altered it must be germane to identify the person who made that improper alteration.

I rule therefore that the publication of this article was privileged under section 10 unless the defendant was actuated by anger, ill-will or other improper motive. Whether that is so is a matter for the jury. The fact the allegation was untrue and the conduct of the defendant before the publication, the manner of publication and his subsequent conduct are all evidence the jury may consider in deciding that question. If they find he was actuated by an improper motive, section 10 gives the defendant no protection.

**Nuku'alofa: 28<sup>th</sup> March, 2001**

**CHIEF JUSTICE**